STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP000361-CR

In the Matter of Sanctions in:
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SUZANNE LEE SHEGONEE,

Defendant-Appellant.

On Appeal from an Order for Sanctions,
the Honorable Richard Radcliffe, Presiding,
Entered in the Monroe County Circuit Court

REPLY BRIEF OF DEFENDANT-APPELLANT

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Monroe County Local Rule 12.045, available at
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ARGUMENT

The circuit court erred when it imposed a $500 sanction on Ms. Shegonee for accepting a new offer presented by the state 3 days prior to trial.

The state agrees the court did not have the authority to sanction Ms. Shegonee under Wis. Stat. § 814.51, because the jury trial demand was withdrawn 3 business days before trial. Thus, those arguments will not be repeated here.

Instead, the state argues the court had the authority to sanction Ms. Shegonee pursuant to Wis. Stat. § 805.03, and the court did not erroneously exercise its discretion in doing so. As will be explained, the state is wrong.

But first, the state did not refute Ms. Shegonee's argument that the court erroneously exercised its discretion because it treated Ms. Shegonee disparately, like defense counsel's disparate treatment in *O'Neil v. Monroe County Circuit Court*, 2003 WI App 149, 266 Wis. 2d 155, 667 N.W.3d 774. (Brief-in-Chief, 18-20). Those arguments should be deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Since those arguments were not refuted, they will not be repeated here.

A. The court erroneously exercised its discretion in sanctioning Ms. Shegonee for conduct by the attorneys.

The state argues the court had the authority to sanction Ms. Shegonee under s. 805.03. It's argument hinges on the court's ability to sanction a client for her attorney's – and the prosecutor's – alleged violation of an order. The state argues the court's order "is limiting as to whose actions may lead to sanction [sic] (attorneys) not as to who may be sanctioned." (Response, 7). In other words, the state believes a client can be monetarily sanctioned for an attorney's violation of a court order. The state ignores the requisite link between the order and the alleged violation. If the court orders person A to do something – but, the order does not apply to person B – person B cannot be sanctioned for person A's failure to abide by the order. Only person A can be sanctioned because it is person A that violated the order.

The state relies on the language of s. 805.03 as justification for its argument. Specifically, "failure of **any party** … to obey any order of the court" may result in sanctions. It is true that a party can be sanctioned for failure to abide by a court order. But, that party must first fail to abide by a court order. The order regarding resolution after the final pretrial recognizes it is the attorneys' role to negotiate, not the represented party. And, thus, it is the attorney who can be sanctioned for failure to abide by the scheduling order: "Failure by either attorney to follow this order

may result in motions being denied or sanctions being imposed." (80).

The state cites to the local Monroe County rules addressing resolution of criminal cases and potential sanctions as support for its argument. Rule 12.045 states: "**Failure by attorneys or *pro se* defendants** to follow these rules may result in sanctions being imposed pursuant to Sections 802.10(7), 814.51, and 805.03, Stats., or the commencement of contempt proceedings which may result in fines, incarceration, or other orders."[1] (Emphasis added). Ms. Shegonee is not an attorney or a *pro se* defendant. Treating *pro se* defendants different than a represented defendant makes sense because a prosecutor cannot communicate – i.e., negotiate – with a represented individual, as will be explained below.

More importantly, the state did not address the fundamental problem with the court's erroneous exercise of discretion here: disparate treatment. The record is clear. The court faulted the prosecutor and defense counsel for the late resolution. Specifically, it characterized their late negotiations as a "lack of respect." (101:28-29). It also expressed uncertainty about Ms. Shegonee's understanding of the deadline: "I'm unclear whether Ms. Shegonee had full understanding of this deadline or not." (101:28). Yet, it

[1] In re the Promulgation of Local Court Rules, Monroe County (April 10, 2006), available at: https://www.wisbar.org/Directories/CourtRules/Wisconsin%20Circuit%20Court%20Rules/Monroe%20County%20Circuit%20Court%20Rules.pdf, p. 18.

was Ms. Shegonee, alone, who was sanctioned. Thus, as explained in the brief-in-chief, and as concluded in *O'Neil v. Monroe County Circuit Court*, the court erroneously exercised its discretion by disparately sanctioning only Ms. Shegonee.

B. Although a defendant decides whether to accept an offer, a defendant has no control over when an offer is made by the state or how defense counsel engages in negotiations.

The state argues a defendant "always has control over negotiations," and thus, it was appropriate to sanction Ms. Shegonee for accepting the state's late offer. (Response, 9). The state confuses accepting an offer – for which a defendant has control – with negotiating a resolution. It is well-established that accepting an offer and entering a plea is a personal right of the defendant. *See State v. Sprang*, 2004 WI App 121, ¶28, 274 Wis. 2d 784, 683 N.W.2d 522. The defendant, alone, chooses whether to accept an offer. However, the defendant does not have any control over what offer is presented, when it is presented, or how defense counsel obtains an offer.

First, a prosecutor is prohibited from negotiating with a represented defendant. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter…" SCR 20:4.2(a). Thus, a represented defendant does not have control over negotiations.

Negotiations occur between the prosecutor and defense counsel. When an offer is made, it is the defendant that decides whether to accept it. Until the offer is made, the defendant does not control the resolution.

Second, defense counsel also does not control negotiations. More specifically, it is the prosecutor that has control over what offers are made and when. Defense counsel can reach out to a prosecutor to negotiate – e.g., email, call, track prosecutor's court calendar – but if the prosecutor does not respond, defense counsel has little control. What's more, the represented defendant has no control.

Here, the court correctly noted the prosecutor and defense counsel's part in the late resolution. However, only Ms. Shegonee, who did not control negotiations, was sanctioned. That is the problem.

The state alleges the procedural history of Ms. Shegonee's case illustrates her control over negotiations and alleges that history was not discussed in the brief-in-chief. (Response, 10). First, the various offers and procedural posture were explained in the fact section. (Brief-in-chief, 9-10). And, a chart was made of the various offers and timing of those offers. (Brief-in-chief, 21). Ms. Shegonee rejected prior offers, but as explained, she accepted a *new* offer presented shortly before trial. It is that new offer that is at issue here.

The state also alleges Ms. Shegonee should have made an offer of proof claiming offers were not relayed

to her. The state opines that had she done so, perhaps the claims raised would "have more merit." The relevance of this is unclear. The record indicates the state made a new offer to Ms. Shegonee days before trial. (102:5). The state has never disputed the fact that it extended this offer to Ms. Shegonee *after* the court's final deadline. Ms. Shegonee promptly accepted that last offer. The issue is not about whether Ms. Shegonee was advised of an offer. The issue is with her being sanctioned for accepting an offer that was not presented by the state until after the court's deadline.

To be clear, the prosecutor had good reasons for presenting the offer when it did: he had a five- or six-day homicide trial that began the day after the final pretrial conference, which consumed the entirety of his time, then there was Thanksgiving, several trials were stacked that day so he was trying to get through negotiations on all of them, and he was out of the office with limited cell phone and internet service. (102:5-7). The problem is with sanctioning Ms. Shegonee for accepting the late, but reasonably late, offer.

C. The new offer was significantly different.

The state alleges the new offer was largely similar to prior offers, and therefore, the court did not erroneously exercise its discretion in sanctioning Ms. Shegonee. The state alleges the changes to the offer were of no import because although the joint recommendation was different, the court is not bound by the recommendation, the maximum penalties were

the same and the end dates for the diversion and probation were similar. The state's arguments ignore the fact that people who are charged with crimes are not a monolithic group. People have different perspectives about what is an acceptable offer. As defense counsel put it here, the accepted offer was "much closer to what would be acceptable" with Ms. Shegonee. (102:4).

Here, again, are the offers:

March 22, 2021 offer	**November 9, 2021 offer**	**December 6, 2021 offer**
4 counts: attempted battery of a law enforcement officer, resisting, disorderly conduct, an added (second) count of disorderly conduct. Felony: **30-month** diversion agreement, 80 hours community service. 3 misdemeanors: impose but stay 180 days jail, **2 years of probation**. No jail.	4 misdemeanors: attempted misdemeanor battery, resisting, disorderly conduct, an added (second) count of disorderly conduct. 2 disorderly conduct counts: **180 days jail**. Attempted battery and resisting counts: impose but stay 180 days jail, **2 years of probation,** 80 hours community service.	4 counts: attempted battery of a law enforcement officer, resisting, disorderly conduct, an added (second) count of disorderly conduct. Felony: **6-month** diversion agreement. 3 misdemeanors: **12 months** of probation. No jail, no community service.

The state argues that the end dates for the diversion agreement were similar, and therefore, the offers were largely similar. This logic fails, but also, it is simply untrue. First, with regard to the diversion agreements, the state concedes the end dates for the diversion agreements were **15 months** apart. With the old offer, Ms. Shegonee's diversion agreement would have been **2 years longer** than the accepted offer – and, to the state's point – even if Ms. Shegonee accepted the offer in March 2021, her end date based on that offer would have been **15 months** later than the one she accepted. An additional 2 years of a diversion agreement or an end date 15 months later may not be a big deal to the state, but it is a big deal to most people.

And, although the probation end date for an accepted March offer would have been only 3 months longer than the end date for the December accepted offer, the time on supervision – i.e., threat of revocation – was twice as long with the March and November offers. An extra year of supervision is, again, a big deal. When working in the criminal system every day, people can become desensitized to the enormity of supervision, sentences, and convictions. But to the real people subjected to those penalties, a year of your life without supervision is important.

Finally, the $500 sanction imposed upon Ms. Shegonee was significant. That is a lot of money, especially for someone who qualifies for State Public Defender representation. It was ordered without an

appropriate exercise of discretion. And, the amount imposed only appears to be connected to one thing: the amount of money Ms. Shegonee posted to be released.

CONCLUSION

For the reasons stated in Ms. Shegonee's initial brief and here, the court did not have the authority to sanction Ms. Shegonee $500 for accepting a new plea offer after the court's settlement deadline. As such, Ms. Shegonee respectfully requests this court reverse the circuit court and vacate the sanction order.

Dated this 19th day of October, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,919 words.

Dated this 19th day of October, 2022.

Signed:
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